No. 97-1374

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

WILLIAM J. CLINTON, *et al.*,
Appellants,

v.

CITY OF NEW YORK, *et al.*,
Appellees.

ROBERT E. RUBIN,
Appellant,

v.

SNAKE RIVER POTATO GROWERS, INC., *et al.*,
Appellees.

On Appeal from the United States District Court for the District of Columbia

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BRIEF OF APPELLEES SNAKE RIVER POTATO GROWERS, INC. AND MIKE CRANNEY

DONALD B. HOLBROOK
RANDON W. WILSON
WILLIAM H. ORTON
ANDREW H. STONE
JONES, WALDO, HOLBROOK & McDONOUGH
170 South Main Street
Salt Lake, UT 84101
(801) 534-7283

LLOYD N. CUTLER
LOUIS R. COHEN
Counsel of Record
LAWRENCE A. KASTEN
JONATHAN J. FRANKEL
PAUL R. ECKERT
MATTHEW A. BRILL
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000

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QUESTIONS PRESENTED

1. Whether appellees Snake River Potato Growers, Inc. and Mike Cranney have Article III standing.

2. Whether the Line Item Veto Act of 1996 violates Article I of the Constitution or principles of separation of powers.

RULE 29.6 LISTING

Appellee Snake River Potato Growers, Inc. is a non-profit agricultural cooperative association incorporated under the laws of Idaho. It has no parent companies or subsidiaries.

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OPINION BELOW

The opinion of the district court is now reported at 985 F. Supp. 168.

JURISDICTION

The district court had jurisdiction under 2 U.S.C. § 692(a) and 28 U.S.C. § 1331. The order of the district court was entered on February 12, 1998. A notice of appeal was filed on February 13, 1998. J.S. App. 34a-35a. This Court noted probable jurisdiction on February

27, 1998. This Court has jurisdiction under 2 U.S.C. § 692(b).[1]

STATEMENT

Article I of the Constitution prescribes a "single, finely wrought and exhaustively considered, procedure" for enacting, amending, and repealing federal laws. *INS v. Chadha*, 462 U.S. 919, 951 (1983). The heart of that procedure is the requirement that both houses of Congress pass, in the same final form, every bill that adds, amends, or repeals any provision of any federal statute. Each bill so passed must be presented to the President, whose choices are limited to approving it in whole, returning it in whole, or taking no action.

The Line Item Veto Act of 1996, 2 U.S.C. §§ 691 *et seq.* (Supp. II 1996) ("LIV Act" or "Act"), departs from this procedure by authorizing the President alone to "cancel" provisions of certain bills in conjunction with their enactment. Whether this is viewed as a power to produce truncated laws never passed by either House or as a unilateral power to repeal duly enacted provisions of law, it is a power that Article I does not permit the President to have.

This case was brought by a farmers' cooperative and an individual member and officer of the cooperative. They

[1] Appellants argue, for the first time in their merits brief in this Court, that some appellees do not have statutory standing under 2 U.S.C. § 692, the special judicial review provision of the Line Item Veto Act, because they are not "individuals." Appellants do not state what bearing they think this has on the statutory jurisdiction of either the district court or this Court. As to the district court, first, plaintiff Mike Cranney, one of the *Snake River* appellees, is an "individual" statutorily authorized to proceed under 2 U.S.C. § 692(a)(1); second, the *Snake River* appellees pleaded, and the district court plainly had, jurisdiction under 28 U.S.C. § 1331 as well as 2 U.S.C. § 692(a)(1), so the district court's decision is incontestably valid and ripe for review. As to whether that review properly lies in this Court, the Court has jurisdiction under 2 U.S.C. § 692(b) to review "any order of [the district court] . . . issued pursuant to an action brought under [2 U.S.C. § 692(a)(1)]." The district court's order granting summary judgment for plaintiffs is such an order in such an action.

suffered economic injury when the President, acting under the purported authority of the Act, canceled Section 968 of the Taxpayer Relief Act of 1997, Pub. L. No. 105-34, 111 Stat. 788 ("TRA"), which added a new section (Section 1042(g)) to the Internal Revenue Code that was specifically designed to benefit farmers by helping farmers' cooperatives purchase agricultural refining or processing companies.

A. The Line Item Veto Act

The full title of the Act is "An Act to give the President line item veto authority with respect to appropriations, new direct spending, and limited tax benefits." H.R. Conf. Rep. No. 104-491, at 14 (1996). It states that the President may "cancel in whole" any (1) "dollar amount of discretionary budget authority," (2) "item of new direct spending," or (3) "limited tax benefit" by sending Congress a "special message" within five days after signing a bill containing the item. 2 U.S.C. § 691(a). The President may cancel an item whenever he determines that "such cancellation will (i) reduce the Federal budget deficit; (ii) not impair any essential Government functions; and (iii) not harm the national interest . . . ." *Id.* § 691(a)(A). No more specific or substantive determination is required.

The Act defines "dollar amount of discretionary budget authority" as any whole dollar amount of appropriation either set forth in the text of the law or found in (or determinable from) the tables, charts, or explanatory text of statements or committee reports accompanying a bill. *Id.* § 691e(7). Items of new "direct spending" are (a) budget authority provided by law (other than an appropriation law); (b) entitlement authority; and (c) the food stamp program." *Id.* § 691e(5). "Limited tax benefits" include any revenue-losing provision that gives tax relief to 100 or fewer persons in any fiscal year or grants "temporary or permanent transitional relief" from a change in

the Internal Revenue Code to ten or fewer persons. *Id.* § 691e(9)(A).[2]

The Act defines "cancel" as to "prevent . . . from having legal force or effect" (with respect to limited tax benefits or items of new direct spending) and to "rescind" (with respect to any amount of budgetary authority). *Id.* § 691e(4). The term "cancel" and its definition were designed to make clear that the President's action would be permanent and irreversible. The Act's Conference Report explains that "[t]he term 'cancel' was specifically chosen, and is carefully defined . . . . The conferees intend that the President may use the cancellation authority to surgically *terminate* federal budget obligations." H.R. Conf. Rep. No. 104-491, at 20 (emphasis added). For tax benefits, cancellation requires "collect[ion of] tax that would otherwise not be collected or den[ial of] the credit that would otherwise be provided." *Id.* at 29. The Act provides for expedited congressional consideration of "disapproval bills," which, if enacted into law, restore a canceled item in the same form in which it was originally presented to the President, 2 U.S.C. §§ 691d, 691e(6). But a disapproval bill is a new law that must be passed by both Houses and presented to the President in the

[2] The responsibility for identifying "limited tax benefits" lies in the first instance with the Joint Congressional Committee on Taxation. Whenever a bill would amend the Internal Revenue Code, the Joint Committee must prepare a statement either (1) certifying that the bill contains no limited tax benefits, or (2) listing all such items. 2 U.S.C. § 691f. Congress then decides whether to include this information in the bill itself. *Id.* § 691f(b)(1). If Congress includes in the bill the Joint Committee's list of limited tax benefits, the President may cancel only items on the list. *Id.* § 691f(c)(1). If Congress includes in the bill a Joint Committee determination that the bill does not contain any limited tax benefits, the President is bound by that determination. *Id.* If Congress elects not to include in the bill the information contained in the Joint Committee's statement, the President may cancel any item he finds meeting the definition of limited tax benefit. *Id.* § 691f(c)(2).

manner prescribed by Art. I, § 7, cl. 2 of the Constitution.

B. Section 968 of the Taxpayer Relief Act

1. Beginning in 1995, Congress considered a series of bills to help farmers "forward integrate" into processing their crops. *See* H.R. 2676, 104th Cong. (1995); S. 1481, 104th Cong. (1995); H.R. 1752, 105th Cong. (1997); S. 872, 105th Cong. (1997). The mechanism of each bill was to amend the Internal Revenue Code to permit owners of agricultural refining or processing companies to defer paying tax on any capital gain if they sell their companies to "eligible farmers' cooperatives."

The purpose of these bills was to help farmers. When Representatives Roberts and Stenholm introduced H.R. 2676 on November 20, 1995, they told their colleagues that it would "encourage farmers to help themselves in a more market-oriented environment by vertically integrating. If this legislation is passed, we are confident that, 10 years from now, we will look on this bill as one of the most beneficial actions Congress took for U.S. farmers." J.A. 117 (*Letter from Congressmen Pat Roberts and Charlie Stenholm* (Dec. 1, 1995)).[3] Introducing the Senate version of the same bill, S. 1481, Senator Hatch said it "would provide farmers who form farmers cooperatives the opportunity for an ownership interest in the processing and marketing of their products." 141 Cong. Rec. S18739 (daily ed. Dec. 15, 1995). Senator Craig, another of S. 1481's sponsors, said it "would be helpful to farmers cooperatives," noting that "[c]urrently,

[3] *See also* J.A. 116-17 ("We urge you to cosponsor H.R. 2676, legislation introduced last week to provide American farmers a more firm economic footing and more control over their economic destiny. We believe this proposal will help farmers, through their cooperatives, purchase facilities to refine and process their raw commodities into value-added products. . . . H.R. 2676 . . . is tightly drafted to avoid abuse while still accomplishing the goal of giving farmers more control over some of the most profitable activities of agricultural production.").

farmers cannot compete with other business entities . . . in buying such [processing] businesses because of the advantages inherent in the tax deferrals available in transactions with these other purchasers."[4] *Id.*

On May 27, 1997, Representative Hulshof introduced a very similar new bill in the House, H.R. 1752, *supra*, and on June 10, 1997, Senator Roberts introduced an identical measure in the Senate, S. 872, *supra*. These bills were again designed to help farmers "more readily participate in the risks and rewards of food processing." J.A. 118 (Press Release, *Hulshof Introduces Farmer-Friendly Legislation* (May 30, 1997)).[5]

In June 1997, a section virtually identical to the Hulshof and Roberts bills was included in the House's version of the TRA. *See* H.R. 2014, 105th Cong. (1997); Joint Committee on Taxation, *Description of Chairman's Mark Relating to Revenue Reconciliation Provisions* 108 (June 9, 1997) (Record at Docket Entry 14 (*see* J.A. 8), App. Tab 12). The Committee Report on the House bill explains that, "[t]he Committee believes it appropriate to facilitate the transfer of refiners and processors to farmers' cooperatives." H.R. Rep. No. 105-148, at 420 (1997). The provision was accepted by the conference with minor modifications, *see* H.R. Conf. Rep. No. 105-220, at 479 (1997), and was enacted into law as

[4] Senator Craig appears to have been referring to the fact that an ordinary business corporation can acquire a food processing or refining company in a merger or stock-for-stock transaction in which no gain is recognized to the seller. *See* 26 U.S.C. §§ 354(a), 368(a), 1032. A farmers' cooperative, although a corporation, cannot engage in such a transaction because its stock may be held only by its farmer members. *See* 26 U.S.C. § 521(b)(2).

[5] Representative Hulshof said of the bill, "[a] corn farmer will not only benefit from the sale of the corn at the grain elevator, but will also be able to share in the proceeds of the sale of cereal. Similarly, a soybean producer can potentially profit from the sale of cooking oil, rather than just on the sale of the soy beans." J.A. 118 (internal quotations omitted).

Section 968 of the TRA, Pub. L. No. 105-34, 111 Stat. 788, 895-96.

2. Section 968 amended section 1042 of the Internal Revenue Code, 26 U.S.C. § 1042, an existing provision that permits nonrecognition of gain on sales of certain securities to employee stock ownership plans if the proceeds of the sale are invested in "qualified replacement property."[6] Specifically, Section 968 added a new subsection, 26 U.S.C. § 1042(g) (canceled) (J.S. App. 73a-74a), which provided for nonrecognition of gain on sales of stock of "qualified refiner[s] or processor[s]" to "eligible farmers' cooperative[s]." *Id.* § 1042(g)(1), (2). Eligible farmers' cooperatives are defined as associations of farmers and growers "engaged in the marketing of agricultural or horticultural products," organized in cooperative form to return to their members the proceeds of the sale of such products. *See id.* § 1042(g)(3).[7] Qualified refiners or processors are (1) domestic corporations, "substantially all of the activities of which consist of the active conduct of the trade or business or refining or processing agricultural or horticultural products," that (2) during the year prior to sale bought more than one-half of their produce from the purchasing cooperative or the farmers who make up the purchasing cooperative. *Id.* § 1042(g)(2).

3. The Joint Committee identified 79 provisions of the TRA, including Section 968, as "limited tax benefits." *See*

[6] 26 U.S.C. § 1042(a)(2), (c)(4). In general, qualified replacement property is any security issued by a domestic corporation, other than the corporation that issued the securities being replaced, that did not have excess "passive income" in the preceding taxable year.

[7] Section 1042(g)(3) defines "eligible farmers' cooperative" by reference to the general Internal Revenue Code provisions relating to cooperatives (26 U.S.C. §§ 1381-83), which in turn incorporate the definition of "farmers' cooperative" found at Section 521 of the Code (26 U.S.C. § 521).

H.R. Conf. Rep. No. 105-220, at 771-75. Pursuant to section 691f(b)(2) of the LIV Act, Congress included the Joint Committee's list in the TRA as a separate section. *See* Pub. L. No. 105-34 § 1701, 111 Stat. 1099-1103. President Clinton signed the TRA on August 5, 1997. On August 11, 1997, he sent a special message to Congress canceling two items in the TRA, one of which was Section 968. J.S. App. 66a-67a, 70a-71a.

In his special message, the President acknowledged that the purpose of Section 968 was to "encourage value-added farming through the purchase by farmers' cooperatives of refiners or processors of agricultural goods." J.S. App. 71a. And the President stated again, in remarks to the press about the cancellation later that same day, that farmers were the intended beneficiaries of Section 968 and those affected by its cancellation: "Because I strongly support family farmers, farm cooperatives, and the acquisition of production facilities by co-ops, this was a very difficult decision for me." J.A. 125 (33 Weekly Comp. Pres. Doc. 1225, 1226 (Aug. 11, 1997)).[8] The President said he was nevertheless canceling Section 968 because he thought it created "opportunities for complete avoidance of tax" and "failed to target its benefits to small-and-medium-size cooperatives." J.S. App. 71a.

C. Snake River, Cranney, and Their Efforts To Acquire Processing Facilities

In the district court, the *Snake River* appellees submitted a declaration of appellee Cranney ("Cranney Dec.") to demonstrate, and place into context, the concrete injury they sustained as a result of the removal of

[8] Appellant Rubin agreed: "[L]et me tell you, in our analysis . . . [w]e focused on exactly what the President has said, which was, what effect would this have on farmers and on co-ops and on processors . . . ." *Transcript of Press Briefing by Treasury Secretary Bob Rubin, OMB Director Frank Raines, Director, National Economic Council Gene Sperling*, at 6 (White House Aug. 11, 1997) (Record at Docket Entry 14 (*see* J.A. 8), App. Tab 19).

Section 1042(g) from the Internal Revenue Code. J.A. 108-115. Appellants did not submit any evidence in response to appellee Cranney's declaration.

As described in that declaration, Snake River was organized in May 1997. Its principal purpose was to serve as a vehicle for its Idaho potato farmer members to acquire and control processing facilities so they could store and market their potatoes. J.A. 110 (Cranney Dec. ¶¶ 9, 10). Snake River expected that this ownership and control would help farmers not only to share the proceeds of processing but also to combat price swings by timing sales to take advantage of market conditions. J.A. 111 (Cranney Dec. ¶ 13).

Members of Snake River had relevant immediately prior experience with such acquisitions. Cranney and other members of Snake River also grow sugar beets. In July 1996, they attended a meeting in Burley, Idaho of a different cooperative, Snake River Sugar Company, to discuss acquisition of sugar beet processing facilities. At the meeting, they learned of then-pending legislation, H.R. 2676, *supra*, to allow owners of processing companies to sell them to farmers' cooperatives without recognition of gain. *See* J.A. 109 (Cranney Dec. ¶¶ 3, 4). Throughout the fall of 1996, Snake River Sugar Company (in which Cranney had become a member) attempted to negotiate the purchase of a processing facility owned by Amalgamated Sugar Company. J.A. 109-10 (Cranney Dec. ¶¶ 5-6). The negotiations were premised on the parties' expectation that H.R. 2676 would be enacted. J.A. 109, 111-12 (Cranney Dec. ¶¶ 3, 4, 16). In January 1997, at a point when this tax legislation appeared dormant, Snake River Sugar Company purchased Amalgamated's processing facilities anyway, but in a more expensive transaction. J.A. 109-10 (Cranney Dec. ¶ 6). Amalgamated, the seller, continued to insist on nonrecognition of gain. This proved achievable, but only in a more complex transaction structure that did not allow use of the purchased

facilities as collateral for the purchase loan (so that the cooperative needed to take out a more expensive unsecured loan) and had large legal and accounting costs. *Id.* Cranney believes the structure used in the sugar purchase would be impossible for generally less prosperous potato farmers. *See* J.A. 109-10, 111-12 (Cranney Dec. ¶¶ 6, 16).

When the President canceled Section 968, appellees were actively engaged in the acquisition process. In January 1997, Potato Growers of Idaho, a bargaining cooperative for Idaho potato growers whose membership included appellee Cranney, learned that Ore-Ida Foods, a large potato processing company, was interested in selling one or more of its Idaho potato processing facilities. J.A. 110 (Cranney Dec. ¶ 8). In February, representatives of Potato Growers of Idaho briefed Ore-Ida on the status of the legislative effort and on how the tax legislation would give Ore-Ida a financial incentive to sell to the cooperative. J.A. 110-11 (Cranney Dec. ¶ 11). Before a transaction could be negotiated, however, Ore-Ida sold its Idaho facilities to McCain Foods Limited, a Canadian agribusiness company. J.A. 111 (Cranney Dec. ¶ 12); *see also* Jodi Rave, *Ore-Ida Sale May Cost 900 Jobs,* Idaho Statesman, 1997 WL 5428739 (Mar. 15, 1997).

Beginning in February 1997, members of the potato bargaining cooperative, Potato Growers of Idaho, began planning to organize appellee Snake River as a new cooperative for the purpose of purchasing processing facilities. J.A. 110 (Cranney Dec. ¶¶ 9, 10). They were aware as they did so of efforts in Congress to reintroduce the tax legislation. *Id.* Snake River was incorporated in May 1997. Cranney became its vice chairman. J.A. 109 (Cranney Dec. ¶ 2).

Appellees started immediately on their first effort to acquire a facility with the help of the anticipated tax legislation. Cranney and Jim Chapman, General Manager of Snake River, met with Howard Phillips, a principal

owner of Idaho Potato Packers (IPP), a potato processing facility in Blackfoot, Idaho, to discuss the possible sale of an IPP facility to Snake River. J.A. 112 (Cranney Dec. ¶ 19). The discussion at these meetings assumed the enactment, in the near future, of cooperative tax legislation that would permit the sellers of the IPP facility to defer recognition of capital gain. J.A. 113 (Cranney Dec. ¶ 21). Cranney was advised that a deal for the IPP facility could be structured so as to comply with the requirements of anticipated Section 968. J.A. 112-13 (Cranney Dec. ¶¶ 20, 22). Phillips expressed his interest in such a sale should the nonrecognition provision become law. J.A. 112 (Cranney Dec. ¶ 19). The introduction of cooperative tax legislation in Congress in May and June 1997 further encouraged ongoing talks with Phillips. *See* J.A. (Cranney Dec. ¶ 23).

On August 11, 1997, when the President canceled Section 968 of the TRA, talks with Phillips terminated. J.A. 114 (Cranney Dec. ¶ 24). Snake River concluded that further discussions would be futile unless the cancellation of Section 968 was reversed. J.A. 113-14 (Cranney Dec. ¶¶ 21, 24, 25). The members of Snake River will be prepared to resume negotiations with Phillips and IPP, and will identify other processing facilities for possible future purchase, if the President's cancellation is invalidated. J.A. 114-15 (Cranney Dec. ¶ 26).

D. Proceedings Below

Appellees Snake River and Mike Cranney filed suit on October 21, 1997 against appellant Rubin in his official capacity. *Snake River Potato Growers, Inc., et al. v. Rubin,* Civ. No. 97-2463 (TFH) (D.D.C.). Appellees sought a declaratory judgment that the LIV Act is unconstitutional and that the President's purported cancellation of Section 968 is invalid. The complaint alleged subject-matter jurisdiction under both the special judicial review provision of

the Act, 2 U.S.C. § 692(a)(1), and the general federal question jurisdiction statute, 28 U.S.C. § 1331. The complaint alleged that Snake River and Cranney were concretely injured by the President's cancellation of Section 968 because they were deprived of business opportunities that Section 968 was designed to give them and because the cancellation had caused the termination of negotiations toward one specific transaction. The complaint alleged that the Act violates Article I of the Constitution because it impermissibly gives the President line-item veto power and authorizes him to repeal duly enacted provisions of tax and other laws.

The district court consolidated the *Snake River* suit with another action challenging a purported cancellation under the Act, *City of New York v. Clinton*, Civ. No. 97-2393 (TFH) (D.D.C.).[9] Appellants moved to dismiss the *Snake River* and *City of New York* actions on justiciability grounds, and all parties moved for summary judgment on the merits. On February 12, 1998, the court denied appellants' motions to dismiss, denied their motion for summary judgment, granted appellees' motions for summary judgment, and declared the LIV Act and the two cancellations at issue unconstitutional. J.S. App. 1a-33a.

With respect to standing, the district court held that "the Snake River plaintiffs suffered an immediate, concrete injury when the President canceled section 968." J.S. App. at 15a. The court determined that Section 968 had conferred a benefit on the *Snake River* appellees by enabling them to offer would-be sellers of processing facilities the same kind of tax-deferred sale transaction that an ordinary corporate purchaser can offer; as the court noted, an ordinary corporate purchaser can offer a tax-deferred stock-for-stock exchange, but a cooperative could not do

[9] A third action, *NTEU v. United States*, Civ. No. 97-2399 (TFH) (D.D.C.), was settled on statutory grounds.

the same because a cooperative's stock can be held only by its members. *Id.* at 16a. Citing *Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville*, 508 U.S. 656 (1993), the district court ruled that the *Snake River* appellees had standing because the cancellation of Section 968 injured them in the process of bargaining for facilities, whether or not they could prove that any particular transaction would have been consummated. J.S. App. 16a-17a.

The district court also found that it was "highly likely" that the *Snake River* appellees would have been able to take advantage of Section 968. *Id.* at 17a. The court distinguished *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26 (1976), and *Allen v. Wright*, 468 U.S. 737 (1984), as cases in which, although important general principles were involved, any actual injury to the plaintiffs was "entirely" or "purely" speculative. J.S. App. 19a-20a. The district court found the *Snake River* appellees' injuries to be more comparable to those asserted in *Bryant v. Yellen*, 447 U.S. 352 (1980), in which this Court held that farm workers had standing to challenge a regulatory suspension of a reclamation law because it was "likely" that the farm workers, if they prevailed, would have the opportunity to purchase farm lands at below-market prices. J.S. App. 18a.

The district court also rejected appellants' suggestion that appellee Cranney's declaration had not adequately demonstrated that the deal being discussed between Snake River and IPP, which was scuttled when the President canceled Section 968, would have qualified for favorable tax treatment under Section 968. The district court determined that, at a minimum, the discussions "make it clear . . . that Plaintiffs were actively spending their time and money pursuing purchases and that the President's cancellation of section 968 interfered with those plans." *Id.* at 21a. These concrete plans, the district court concluded, distinguished the case from *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). J.S. App. 21a.

On the merits, the district court determined that the LIV Act contravened the bicameralism and presentment requirements of Article I in two respects. First, the "laws that resulted after the President's line item veto were different from those consented to by both Houses of Congress." J.S. App. 24a. Congress, the district court found, "through a process of discussion and compromise, had agreed on the exact content of the Balanced Budget Act and the Taxpayer Relief Act," not on the truncated versions of those laws that resulted from the President's exercise of the cancellation power. *Id.* "Because the laws that emerged after the Line Item Veto are not the same laws that proceeded through the legislative process, as required, the resulting laws are not valid." *Id.* at 24a-25a. The constitutional prohibition against a Line Item Veto has been clear, the district court noted, since President Washington's tenure. *Id.* at 26a. Rejecting the notion that "the Framers spent significant time and energy in debating and crafting Clauses that could be easily evaded," *id.* (quoting *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 831 (1995)), the district court concluded that "Congress cannot evade this long-accepted requirement by merely changing the timing of the President's cancellation," *id.* at 26a.

Second, the district court found that the requirements of Article I were violated by the President's power of unilateral cancellation of parts of statutes. Repeals or amendments, the district court held, can be achieved only through "independent legislative enactment, which itself must conform with the requirements of Article I." *Id.* at 25a. The President "cannot single-handedly revise the work of the other two participants in the lawmaking process, as he did here when he vetoed certain provisions of these statutes." *Id.* The district court rejected the appellants' "curious[]" contention that "despite its title, the Line Item Veto Act does not authorize the President to 'veto' anything." *Id.* The court noted that by its plain terms, the LIV Act's definition of "cancel" authorizes the President to "rescind" or

to render a provision as having no "legal force or effect." *Id.* Quoting Richard Cardinal Cushing, the district court said, "When I see a bird that walks like a duck and swims like a duck and quacks like a duck, I call that bird a duck." *Id.*

The district court also held that the Act violates the separation of powers by transferring lawmaking power to the President.[10] The President's constitutional role, the district court held, is to "take care that the laws be faithfully executed"; his power cannot be expanded to that of "co-designer" of the law. *Id.* at 30a. By authorizing the President "in his discretion, to pick and choose among portions of an enacted law to determine which ones will remain valid," Congress violated the established principle that the "legislature cannot delegate its power to make a law." *Id.* at 29a (quoting *Field v. Clark*, 143 U.S. 649, 694 (1892)). The court said that no prior delegation of authority to the President was comparable to empowering the President to make "permanent changes to the text of the Internal Revenue Code, as he did in the Snake River case." *Id.* at 30a.

SUMMARY OF ARGUMENT

Standing. The *Snake River* appellees brought this case because they had suffered a concrete, redressable, pocketbook injury. Section 968 of the TRA was enacted to help farmers acquire, through farmers' cooperatives, processing and refining facilities. The congressional sponsors, appellants Clinton and Rubin, and appellees all believed that Section 968 *would* benefit farmers in this way. The undisputed record shows that appellee Cranney and other members of appellee Snake River had very recently purchased

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[10] Although the district court focused primarily on the separation of powers between the legislative and executive branches, it noted that the Act could also affect judicial independence by giving the President a new power to shape the judiciary's budget and exert pressure on its members. J.S. App. 27a n.14.

a processing facility, through another cooperative, in a transaction that was more expensive because Section 968 was not available. They formed appellee Snake River for the purpose of making such acquisitions with the anticipated help of Section 968. They were actively negotiating the first such purchase when the President's cancellation of Section 968 caused them to stop their efforts, which they would resume if Section 968 were restored.

Farmers and farm cooperatives such as appellees were the stated beneficiaries of Section 968 and the acknowledged victims of its cancellation. Moreover, this Court's decisions establish that a plaintiff who is actively pursuing specific business transactions, and whose pursuit is concretely impeded by governmental action, has standing to challenge that action even if he is not the person named in the governmental action. *E.g.*, *Bryant v. Yellen*, 447 U.S. 352 (1980). The Court's decisions also establish that such a plaintiff need not show that he would necessarily have completed any particular transaction, *e.g.*, *Northeastern Fla. Chapter of Associated General Contractors v. City of Jacksonville*, 508 U.S. 656 (1993), and here there was ample support for the district court's conclusion that pertinent transactions were "highly likely."

This case is very different from cases, cited by appellants, in which plaintiffs come to court to challenge a general principle whose impact on the plaintiffs themselves is at best speculative. *E.g.*, *Allen v. Wright*, 468 U.S. 737 (1984); *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26 (1976). The Snake River appellees came to court because Congress gave them an important economic benefit and the President took it away in an unlawful manner. They would "personally benefit in a tangible way from the court's intervention." *Steel Co. v. Citizens for a Better Environment*, 118 S. Ct. 1003, 1017 n.5 (1998).

The Merits. The finely wrought procedure set forth in Article I of the Constitution requires that every bill adding,

amending, or repealing any provision of federal law be passed in the same form by both Houses of Congress and presented to the President, who must sign, veto, or take no action with respect to each bill "in toto." These requirements are not empty formalities: they were carefully designed to assure that federal laws have the consent of the governed, expressed through their elected representatives. The LIV Act violates Article I by authorizing the President to "cancel" undesired provisions of a tax or spending bill in conjunction with the enactment of the bill, producing a truncated law not passed by either House of Congress. The Act's title, its structure (which mimics the veto process), and the objectives stated throughout its legislative history all confirm the intention to give the President a "final edit" that the Constitution does not permit him to have.

Appellants argue that the Act is saved by a *scintilla juris*: it requires the President first to sign the whole bill and only then, an instant or up to five days later, cancel the provisions he would have liked to veto. But at best this makes the Act merely an "indirect attempt[] to accomplish what the Constitution prohibits . . . accomplishing directly," *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 829 (1995), implying that "the Framers spent significant time and energy debating and crafting clauses that could be easily evaded," *id.* at 831. And in any event this too-clever device is itself unconstitutional because "repeal of statutes, no less than enactment, must conform with Art. I." *Chadha*, 462 U.S. at 954. "Cance" in this context means the same thing as "repeal," and under the Act the President's cancellation of Section 968 stripped a provision out of the Internal Revenue Code and permanently ended its "legal force or effect." Cancellation is an action that only Congress has the power to reverse, or to take.

Appellants' argument that the Act is a deemed part of each later tax or spending bill begs the question. Con-

gress could not adopt, for example, an "Internal Revenue Code of 1999" containing a provision authorizing the President to "cancel" any of its provisions within five days after enactment as long as he deems cancellation not contrary to the national interest. Such a provision would be swiftly condemned as an abdication of the responsibility to write the nation's tax laws, and the operation of the LIV Act in conjunction with the TRA is just as clearly an unconstitutional abdication.

The "fundamental precept . . . is that the lawmaking function belongs to Congress . . . and may not be conveyed to another branch." *Loving v. United States*, 116 S. Ct. 1737 (1996). The Act violates that precept. The "delegation" cases cited by appellants are not in point, because the Act does not delegate a discretionary power to the President to take care that the laws are faithfully executed. It conveys to him, acting alone, part of the power to shape the law itself, to alter the body of federal statutes that define the rights of private persons. Moreover, if the Court's delegation doctrine were applicable, the Act would violate it: the Act sets forth no "intelligible principles" constraining presidential exercise of the cancellation power—precisely because its intention was to give the President lawmaking powers.

ARGUMENT

I. THIS CASE IS JUSTICIABLE

A. "Prudential" Standing Is Not at Issue.

The Act provides that "Any . . . individual adversely affected by [the Act] may bring an action . . . for declaratory judgment and injunctive relief on the ground that any provision of [the Act] violates the Constitution." 2 U.S.C. § 692(a)(1). This provision "eliminates any prudential standing limitations." *Raines v. Byrd*, 117 S. Ct. 2312, 2318 n.3 (1997) (citing *Bennett v. Spear*, 117

S. Ct. 1154, 1162-63 (1997)); *id.* at 2323 n.1 (Souter, J., concurring). Appellants do not disagree.[11]

B. Appellees Have Constitutional Standing To Challenge the Line Item Veto Act.

The requirements for Article III standing are not in dispute. "To meet the standing requirements of Article III, '[a] plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief.'" *Raines v. Byrd*, 117 S. Ct. at 2317 (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984) (emphasis deleted)). The alleged injury must amount to "invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) 'actual or imminent.'" *Defenders of Wildlife*, 504 U.S. at 560 (citation and footnote omitted). This Court recently emphasized that this doctrine can be boiled down to a fundamental inquiry: "whether a plaintiff 'personally would benefit in a tangible way from the court's intervention.'" *Steel Co. v. Citizens for a Better Environment*, 118 S. Ct. 1003, 1017 n.5 (1998) (quoting *Warth v. Seldin*, 422 U.S. 490, 508 (1975)).

The *Snake River* appellees came to court because they had suffered a concrete and redressable injury to their pocketbook interests. Cranney and other farmer members of Snake River want to own and control potato processing facilities so that, among other things, they are not solely at nature's mercy in selling their crops but can store their crops and time their sales to fit the market. Section 968 was designed specifically to help farm cooperatives purchase such facilities, and its congressional sponsors and the President, as well as appellees themselves, believed that Section 968 *would* help. Members of Snake River had pursued such a purchase in another cooperative, completing one that was in fact more expensive because Section 968 was not available. Snake River itself

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[11] *But see* n.1, *supra*.

was formed for the specific purpose of making such purchases, and it was actively discussing the first such purchase with a seller who appeared to be interested on the assumption that Section 968 would allow nonrecognition of his gain for tax purposes. *See* pp. 8-11, *supra*. The President's cancellation of Section 968 injured appellees not only by bringing those discussions to an end but by impeding a planned program of acquisitions. This case is very different from this Court's cases in which plaintiffs sought to litigate general principles whose impact on the plaintiffs themselves was highly doubtful.

Appellants argue that because the taxpayer directly affected by new Section 1042(g) was the *seller* of processing facilities, would-be *purchasers* do not have standing to challenge its cancellation. *See* Brief For Appellants ("Gov. Br." or "Br.") 26-27. But, first, this Court has repeatedly held that a party has constitutional standing to complain of genuine injury to himself resulting from governmental regulation of someone else. *See, e.g., Bennett v. Spear*, 117 S. Ct. 1154 (1997) (water users had standing to complain of regulatory action affecting other demands for water); *Bryant v. Yellen*, 447 U.S. 352 (1980) (farmers wishing to purchase land had standing to complain of allegedly unlawful regulatory suspension of law relating to the irrigation rights of others).

Moreover, the specific objective of Section 968 was to help farm cooperatives like Snake River and farmers like Cranney. They were the intended beneficiaries of Section 968 and the victims of its cancellation. The text and structure of Section 968 make this clear: the statute was available to any would-be seller, but it limited the class of purchasers to "eligible farmers' cooperatives," *see* J.S. App. 73a, because the purpose was to benefit them. The congressional sponsors, other members of Congress, and appellant Clinton all clearly acknowledged the point.[12]

[12] *See, e.g.*, H.R. Rep. No. 105-148, at 420 (1997); J.A. 116-17 (*Letter from Congressmen Pat Roberts and Charlie Stenholm* (Dec. 1, 1995)); J.A. 118-120 (Press Release, *Hulshof Introduces Farmer-Friendly Legislation* (May 30, 1997)); 141 Cong. Rec. S18739 (daily ed. Dec. 15, 1995) (statement of Senator Hatch); *id.* (statement of Senator Craig); J.S. App. 71a (President's cancellation message); *Transcript of Press Briefing by Treasury Secretary Bob Rubin, OMB Director Frank Raines, Director, National Economic Council Gene Sperling*, at 6 (White House Aug. 11, 1997) (Record at Docket Entry 14 (*see* J.A. 8), App. Tab 19). *See generally* pp. 5-8, *supra*.

The President said he regretted vetoing Section 968 because it would have supported "family farmers, farm cooperatives, and the acquisition of production facilities by co-ops." *See* p. 8, *supra*, citing J.A. 125 (33 Weekly Comp. Pres. Doc. 1225, 1226 (Aug. 11, 1997)).

The Court has said that when a party is the very object of challenged government action, "there is ordinarily little question that the action or inaction has caused . . . injury, and that a judgment preventing or requiring the action will redress it." *Defenders of Wildlife*, 504 U.S. at 561-62. Appellants assert (Br. 26) that appellees are *not* the "objects" of Section 968 because they are not the taxpayers. But this avoids the central point: where Congress specifically intends to benefit a class of which the plaintiff is a member, and the President specifically intends to take that benefit away from that class, a court begins with their judgments—not merely the plaintiff's assertion—that their actions will in fact affect the plaintiff. Appellees are the "objects" of the governmental action in that sense here. Congress and the President expected Section 968 to help farmers' cooperatives and their members and expected its cancellation to hurt them, and appellants are in the position of quarreling with these expectations.[13]

[13] Appellants note (Br. 27) that the government has traditionally sought to confine tax litigation to cases in which the taxpayer is a party. But that concern is reflected in, and answered by, statutory limitations not applicable here. *E.g.*, 26 U.S.C. § 7421(a) (Anti-Injunction Act). There is no doubt that a variety of persons (*e.g.*, heirs, donees, employees, or vendees) can have a *constitutionally*

Appellants next contend (Br. 27-31) that appellees' injuries are fatally speculative because appellees cannot establish with certainty that they would have consummated any particular purchase if Section 968 had not been canceled. But the Court has repeatedly held that a plaintiff who is actively pursuing a prospective acquisition of property, or actively negotiating a prospective contract, has standing to challenge government action that concretely and adversely affects the *process* of pursuit, without showing that the challenged action necessarily altered the outcome. *E.g.*, *Bennett*, 117 S. Ct. at 1163-65 (water users had standing to challenge report that threatened to reduce total available quantity of water and, indirectly, their own supply); *Northeastern Fla. Chapter of the Associated Gen. Contractors v. City of Jacksonville*, 508 U.S. 656, 666 (1993) (non-minority contractors had standing to challenge minority preference in government contracting process without showing that they would have received contracts in absence of preference);[14] *Yellen*, 447 U.S. at 366-68 (would-be purchasers of farmland had standing to challenge change of irrigation policy affecting motivations of sellers; plaintiffs had not identified any particular farmland for purchase); *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 261-62 (1977) (when challenged government action stands as a barrier

sufficient interest in another person's taxes. *See United States v. Williams*, 514 U.S. 527, 538-39 (1995); *South Carolina v. Regan*, 465 U.S. 367 (1984); *cf. National Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 118 S. Ct. 927, 933 n.4 (1998).

[14] Appellants argue that the district court's reliance on *Associated General Contractors* is "misplaced" because appellees "have not asserted an equal protection claim." Br. 33. But appellants have missed the district court's point: *Associated General Contractors* plainly holds that if a business entity is actively seeking an advantageous contract, for which it is qualified, it has standing to challenge illegal governmental action that makes it significantly harder for the entity to achieve its goal. Appellees are claiming exactly that kind of injury in a business negotiating process (albeit resulting from a different alleged constitutional violation) in this case.

to consummation of a detailed and specific project, court is not required to engage in undue speculation about likely success of project; business uncertainties attending every transaction should not operate to defeat standing); *Secretary of State v. Joseph H. Munson Co.*, 467 U.S. 947, 954-55 (1984) (characterizing as an "actual injury" a charity's "reluct[ance] to enter into a contract" with a plaintiff fundraiser because of a challenged statutory limitation).[15]

Appellants' claims fit comfortably within this category of cases. Snake River was formed for the express purpose of purchasing processing and refining facilities, and it was taking concrete and specific steps toward the first such purchase (and planned to pursue others as well) from among the "ample" supply of potato "processing facilities in the state of Idaho." J.A. 111 (Cranney Dec. ¶ 14); *see* pp. 9-11, *supra*. The cancellation of Section 968 thwarted these plans; it deprived Snake River of the valuable opportunity to offer sellers a tax saving, and it put Snake River at a competitive disadvantage vis-a-vis ordinary business corporations that can acquire processor companies in stock-for stock transactions that afford nonrecognition treatment to the seller.[16] Appellants suggest

[15] *Cf. Allen v. Wright*, 468 U.S. 737, 751 (1984) (emphasizing that relief need only "be 'likely' to follow from a favorable decision.").

[16] Appellants respond to the district court's conclusion that Section 968 "put [appellees] on equal footing with their competitors and its cancellation disabled them from competing on an equal basis," J.A. App. 16a-17a, by arguing that ordinary corporations face an offsetting disadvantage because they are taxed at both the corporate and the shareholder level. *See* Br. 32 n.16. But appellants' argument is no answer to the district court's finding, J.S. App. 9a, that ordinary corporations can use tax-free exchanges to compete for processing facilities at an advantage over farmers' cooperatives. *See, e.g.*, J.A. 111 (Cranney Dec. ¶¶ 12, 15); 141 Cong. Rec. S18739 (daily ed. Dec. 15, 1995) (statement of Senator Craig). From the perspective of a *seller*, the pertinent tax consequence is whether the seller is taxed on his capital gain.

that the district court engaged in " 'unadorned speculation,' " *see* Br. 29-30, but it is appellants who are speculating when they imply that hard-working farmers were wasting their time.[17]

Bryant v. Yellen, 447 U.S. 352, is particularly instructive. The Court ruled in that case that would-be purchasers of farmland could challenge the Secretary of Interior's suspension of reclamation laws barring delivery of federal irrigation water to any parcel of land larger than 160 acres held by a single owner. Plaintiffs argued that they were injured by the suspension because, if it were lifted, owners of larger parcels would sell their "excess"

[17] All complex corporate transactions require working out of details, but contrary to appellants' lengthy footnote (Br. 29-30 n.13), there is no reason to believe that the Snake River appellees could not have accomplished the IPP transaction and other transactions in a manner that would qualify under Section 1042(g). First, there is no dispute that Snake River is an "eligible farmers' cooperative." Second, on its face Section 1042(g) would not have required either the cooperative or the processor company to have been in existence a full year; on the contrary, farmers who "make up" the cooperative can have made eligible sales, and a processor company that has bought more than half its crops from such farmers for its whole life would be in full literal compliance. But if it had been necessary for Snake River to contract for a year of crop sales culminating in a purchase of the processor company, there was no obstacle to doing so. (This Court has often found standing where the completed injury was a year or more away. *E.g.*, *Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252 (1991); *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59 (1978); *Bennett v. Spear*, 117 S. Ct. 1154 (1997).) Third, contrary to the contention that a transfer of the processing facility by IPP to a wholly owned subsidiary would be a taxable event, an owner interested in selling processing facilities could place them in corporate solution before making any "agreement," Rev. Rul. 70-140, 1970-1 C.B. 73, or "irrevocable contract," *Intermountain Lumber Co. v. Comm'r*, 65 T.C. 1025 (1976), and thus achieve tax free incorporation. *See* Boris I. Bittker & James S. Eustice, *Federal Income Taxation of Corporations and Shareholders* ¶ 3.09[2] (6th ed. 1997); Tech. Adv. Mem. 87-35-009 (May 29, 1987).

lands at "below market" prices in order to qualify for irrigation deliveries.[18] The Court acknowledged that the would-be purchasers "could not with certainty establish that they would be able to purchase excess lands if [the suspension were lifted]," *id.* at 367, but concluded that it was "highly improbable" that landowners would prefer to go without irrigation instead of selling enough lands to meet the 160 acre limit, *id.* at 367-68. Snake River's standing is if anything clearer than the standing of the would-be purchasers in *Yellen*, who were not the stated beneficiaries of the irrigation policy or the targets of the Secretary's suspension of that policy and could not allege any ongoing negotiations or specific plans.[19]

Appellants cite (Br. 27-28) *Allen v. Wright*, 468 U.S. 737 (1984), and *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976), but those cases are very different from this one. In each, the plaintiffs were pursuing what they saw as an important general constitutional principle, but the connection between the challenged government action and any injury to the plaintiffs themselves was "attenuated at best," *Allen*, 468 U.S. at 757, or "purely speculative," *Simon*, 426 U.S. at 42. In *Allen*, plaintiff parents of minority public school students challenged tax exemptions for racially discriminatory private schools, but the Court held they could not

[18] The pertinent provision of the reclamation law would have required landowners of greater than 160 acres to sell "excess" land at scheduled prices that did not reflect the value of federal irrigation rights. *Id.* at 367 n.17.

[19] Appellants contend that the irrigation policy in *Yellen* could be expected to have a "determinative or coercive effect," Br. 30-31 n.14 (quoting *Bennett v. Spear*, 117 S. Ct. at 1164), but the *Yellen* Court noted that "[t]he Court of Appeals . . . recogniz[ed] that no owner of excess lands would be required to sell," *Yellen*, 447 U.S. at 367. The likelihood of successful purchases by the *Yellen* plaintiffs, who apparently had presented no evidence that they could afford any particular parcel, was if anything smaller than the likelihood of successful purchases by the *Snake River* appellees, who were actively pursuing such purchases.

show personal injury because there were "[not] enough racially discriminatory private schools receiving tax exemptions to make an appreciable difference in public school integration." 468 U.S. at 757-58. In *Simon*, indigent plaintiffs challenged a revenue ruling reducing the level of service to indigents required for a hospital to enjoy a tax exemption; the Court said any personal injury to the plaintiffs was impermissibly speculative because the hospitals, which received a very small percentage of their revenues from deductible donations, might well forgo the favorable tax treatment rather than suffer the financial drain of additional uncompensated services. 426 U.S. at 42-43.

Appellants seek to bring this case within the principle of *Allen* and *Simon* by asserting that "the likely tax treatment of any capital gain is only one of many factors bearing on a processor's decision whether to [sell]." Br. 28. But here, that tax benefit is neither remote from any actual effect on plaintiffs (as in *Allen*) nor offset by countervailing costs (as in *Simon*). Any particular owner of facilities might have any number of reasons for not selling them, but members of appellee Snake River had completed one actual transaction with a seller who insisted on nonrecognition, and Snake River and Cranney were at work on another transaction with a seller who was interested but only on a nonrecognition basis, and "ample" other facilities were available for their active pursuit. There was abundant support for the district court's finding that it was "highly likely" (J.S. App. 17a) that appellees could take advantage of Section 968.[30]

[30] Appellants also make a redressability argument, not made below, that the district court's declaratory judgment that the Act is unconstitutional does not redress appellees' injury because it will not be binding in the *seller's* tax case. The answer to this is that appellees and all other concerned persons have a right to expect the United States to honor a judgment rendered by the district court specifically charged by Congress with hearing expedited challenges to the Act's constitutionality, 2 U.S.C. § 691, particularly if it is affirmed by this Court. "For the purposes of establishing standing . . . [appellees] may assume it is substantially likely that the President and other executive and congressional officials would abide by an authoritative [ruling] . . . by the District Court." *Franklin v. Massachusetts*, 505 U.S. 788, 803 (1992) (plurality); *see Glidden Co. v. Zdanok*, 370 U.S. 530, 571 (1962). Appellees refrained from seeking injunctive relief only out of respect for the Executive Branch and its unquestioned obligation to "defer to the Judicial Branch for final resolution of questions of constitutional law." *United States v. Mendoza*, 464 U.S. 154, 161 (1984).

The *Snake River* appellees brought their suit because they "personally would benefit in a tangible way from the court's intervention." *Warth v. Seldin*, 422 U.S. at 508. Appellees are seeking neither "psychic satisfaction" from seeing "that the nation's laws are faithfully enforced," *Steel Company*, 118 S. Ct. at 1019, nor to have this Court determine the constitutionality of the LIV Act "*in thesi*," *Marye v. Parsons*, 114 U.S. 325, 328-30 (1885). They are here because the President's cancellation of Section 968 injured them in their pocketbooks by denying them the concrete economic help that Congress had given them.

II. THE LINE ITEM VETO ACT AND THE PRESIDENT'S CANCELLATION OF SECTION 968 OF THE TAXPAYER RELIEF ACT OF 1997 ARE UNCONSTITUTIONAL

The Constitution vests "[a]ll legislative Powers" in Congress. U.S. Const. art. I, § 1. It requires that every bill adding, amending, or repealing a provision of federal law be passed, in the same final form, by both Houses. It gives the President only a qualified check on this process: he has only the power to approve or "return" a whole bill that has been presented to him, and his power of "return" is subject to override by two-thirds of each House. *Id.* § 7, cl. 2. The requirement of bicameral passage of laws, with only a limited and essentially negative formal role for the President, is one of the foundations of our government, and this Court has, when necessary, acted decisively to preserve it. *See, e.g., Youngstown Sheet & Tube Co.*

v. Sawyer, 343 U.S. 579, 587 (1952); *Buckley v. Valeo*, 424 U.S. 1, 129 (1976); *INS v. Chadha*, 462 U.S. 919 (1983); *Bowsher v. Synar*, 478 U.S. 714 (1986). The President's constitutional role is not to make or unmake laws unilaterally, but to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3.

The Act violates the constitutional plan by authorizing the President to make laws that neither House has passed. The Act's purpose, clearly stated in its title and its legislative history, is to give the President the power, in conjunction with signing a bill, to return some of its provisions, leaving a truncated statute in place of the one Congress enacted. The drafters of the Act sought to avoid constitutional objections to such an item veto by requiring the President to sign the whole bill and only then cancel undesired provisions. But that mechanism, too clever by half, is also unconstitutional. It empowers the President, acting alone, to repeal provisions of federal statutes—for example, in this instance, permanently eliminating a congressionally enacted provision of the Internal Revenue Code—in violation of the bicameral passage and presentment requirements of Article I.

Appellants (and amicus Senate) acknowledge that Article I does not permit Congress to give the President item-veto power. *See* Gov. Br. 34; *see also* Brief for United States Senate as Amicus Curiae ("Sen. Br.") 18. And they do not contend that Article I permits Congress to give the President alone the power to repeal a federal statute. Instead, they argue that the Act does not (despite its title) confer item-veto power on the President, because it requires that the President first sign a whole bill and only then strike the items he does not like. Gov. Br. 34-35; Sen. Br. 18. They then argue that "cancellation" of a provision, although it renders the provision permanently without "legal force or effect," is not a repeal but an exercise of the President's power under Article II of the Constitution to "take Care that the Laws be faithfully executed," because the Act itself makes future spending and revenue items subject to cancellation. Gov. Br. 36-40; Sen. Br. 19-20. But appellants struggle in vain: the Act changes the way federal laws are made and unmade, in violation of both the structural principles and the procedural specifics of Article I.

A. Article I Prescribes the Exclusive Means for Making, Amending, and Repealing Federal Laws.

The heart of the Constitution's "finely wrought . . . procedure" for the passage of legislation is bicameral passage. The Framers "provid[ed] that no law could take effect without the concurrence of the prescribed majority of the Members of both Houses." *Chadha*, 462 U.S. at 948. Congressional enactment of all laws is, of course, fundamental to the principle of government by the consent of the governed.[21] And the Framers required passage by both Houses in the same final form quite deliberately, both because it would assure careful and prudent judgment in legislating, *see* The Federalist No. 22 (Hamilton), No. 51 (Madison); *Chadha*, 462 U.S. at 948-51 (citing 1 *The Records of the Federal Convention of 1787*, at 254 (Max Farrand ed. 1966) (statement of James Wilson)), and because it was essential to the "Great Compromise"

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[21] The concept that the laws, and tax laws in particular, must have the consent of the people expressed through their representatives was both a cause of the American Revolution and a purpose for drafting the United States Constitution. *See generally* John Phillip Reid, *The Concept of Liberty in the Age of the American Revolution* (1989). The Stamp Act Congress declared it to be "essential to the freedom of a people . . . that no taxes should be imposed on them, but with their own consent, given personally, or by their representatives." *Journal of the First Congress of the American Colonies, in Opposition to the Tyrannical Acts of the British Parliament Held at New York October 7, 1765*, at 27-29 (1845). And prominent among the "injuries and usurpations" of the King, identified by the 1776 Congress in the Declaration of Independence, was "imposing Taxes on us without our Consent." *Declaration of Independence* (U.S. 1776).

between the large and small states that enabled the Convention to agree on a Constitution.[22]

The "Presentment Clause," art. I, § 7, cl. 2, requires that every bill passed by both Houses be presented to the President, and it gives him exactly three choices: "[1] If he approves he shall sign it, but [2] if not he shall return it, with his Objections . . ." or [3] he may do nothing, in which case in ten days "the Same shall be a Law, in like Manner as if he had signed it," unless the pocket veto clause applies. These words make it clear that the President may act (or not act) only on the whole bill exactly as it is presented to him: he must consider the "Bill which shall have passed the House of Representatives and the Senate" and make an up-or-down judgment on whether "it" should become law. As the district court said, and appellants acknowledge (Br. 34), the Presentment Clause permits the President only to accept or reject a bill in toto. *See also Field v. Clark*, 143 U.S. 649, 669 (1892) (There is "no authority . . . in the President to approve . . . as a legislative act, any bill not passed by Congress.").

This "in toto" requirement has structural importance.[23] First, it protects the principle of bicameralism: It could not be said that both Houses of Congress have exercised their best judgment, and approved each provision of a law, were it not for the requirement that their handiwork, in its final form, must take effect unedited by the President. The requirement also limits the President's power in the lawmaking process by denying to him the unilateral

[22] Giving the smaller states equal representation in the Senate and the larger states proportionate representation in the House of Representatives is a workable compromise only because both the Senate and the House must pass the same bill in its final form.

[23] *See Chadha*, 462 U.S. at 958 n.23 ("The legislative steps outlined in Art. I are not empty formalities; they were designed to assure that both Houses of Congress and the President participate in the exercise of lawmaking authority.").

power to revise the work of the other participants. And unlike the House and Senate, each of which has the absolute power to block passage of a bill it disfavors, the President has only a qualified blocking power that Congress may override. It would be especially anomalous if the President, the only one of the three participants whose approval is *not* always required for a bill to become law, had the power to revise the work of the other two.[24]

The requirement that the President sign, veto, or leave unsigned the bill as a complete whole has been clear since the first Presidency. As George Washington explained the limitation on his authority, "From the nature of the Constitution, I must approve all the parts of a Bill, or reject it in toto." 33 *Writings of George Washington* 96 (John C. Fitzpatrick ed. 1940). Eighteenth century explanations of the Presentment Clause are consistent with Washington's view. *See generally* 12 Op. Off. Legal Counsel 128, 157-58 (1988). Later Presidents have likewise understood that they could not approve or disapprove only parts of a bill.[25]

[24] According to Hamilton, the Constitution does not give the President any "legislative Powers" but only "a salutary check upon the legislative body" that begins only after both Houses have passed a bill. The Federalist No. 73 (Hamilton). In the Pennsylvania Ratifying Convention, James Wilson denied that the Presentment Clause would give the President legislative power, stating that the language of the clause was precise: " 'If he approve the bill, when it is sent, he shall sign it, but if not, he shall return it;' but no bill passes in consequence of having his assent: therefore, he possesses no legislative authority. [If the President vetoes a bill, but his veto is overridden] it becomes a law, not by his [authority], but by the authority of the two houses of the legislature." 2 *Debates in the Several State Conventions on the Adoption of the Federal Constitution* 473 (Jonathan Elliot ed. 1836).

[25] *See, e.g., The Line-Item Veto: A Constitutional Approach: Hearing on S.J. Res. 2 and S.J. Res. 16 Before the Subcomm. on the Constitution, Federalism, and Property Rights of the Senate Judiciary Comm.*, 104th Cong. 40 (1995) (statement of Ass't Att'y Gen. Dellinger); 12 Op. Off. Legal Counsel 128, 157-65 (1988)

B. The Line Item Veto Act Transfers to the President Lawmaking Power That the Constitution Does Not Permit Congress To Surrender.

The full title of the Act is "An act to give the President line item veto authority with respect to appropriations, new direct spending, and limited tax benefits." H.R. Conf. Rep. No. 104-491, at 14 (1996). Appellants and amicus Senate urge the Court to avert its eyes from this title, arguing that it is inaccurate, but the title conveys precisely what the Act does and was intended to do:

> The Line Item Veto Act purports to establish a procedure for the creation of laws that are truncated versions of bills that have been passed by the Congress and presented to the President for signature. If the procedure were valid, it would deny every Senator and every Representative any opportunity to vote for or against the truncated measure that survives the exercise of the President's cancellation authority.

Raines v. Byrd, 117 S. Ct. 2312, 2325 (1997) (Stevens, J., dissenting).

The Act was carefully designed to mimic the item-veto power that appellants and amicus Senate concede would be unconstitutional. Its power of cancellation can be exercised only in direct connection with signing a bill into

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(describing the view of Presidents Washington, Grant, Hayes, Taft, Wilson, Ford, and Reagan that they were required to sign or return multiple-item bills in toto, even though they favored some items and disfavored others); 9 Op. Off. Legal Counsel 28, 29 (1985); William Howard Taft, *The Presidency: Its Duties, Its Powers, Its Opportunities and Its Limitations* 11 (1916) ("[The President] has no power to veto parts of the bill and allow the rest to become a law. He must accept it or reject it, and even his rejection of it is not final unless he can find one more than one-third of one of the houses to sustain him in his veto."). *See generally Line Item Veto: The President's Constitutional Authority: Hearing on S. Res. 195 Before the Subcomm. on the Constitution of the Comm. on the Judiciary*, 103d Cong. (1994).

law.[26] The power is limited to canceling one or more "items" in the bill "in whole." The cancellation does not merely suspend or terminate implementation of the provision; it renders the provision without "legal force or effect," depriving everyone (including the President himself) of all further authority thereunder. The cancellation is permanent; canceled provisions can become law again only if a new statute is enacted in the full constitutional manner. And within the vetoable categories, the Act gives the President *no* meaningful substantive instructions or guidance but instead leaves him to make the same kind of decision he makes in any other exercise of his veto power: whether in his sole judgment an "item" would be a good or bad law. The whole point was to grant him the practical power to accept some parts of a bill and reject others.

Congress fully intended to give the President just such a fundamentally legislative role. In general, the Act was the outgrowth of a lengthy effort to confer on the President the item-veto power that 43 state *constitutions* give to their governors—but without amending the U.S. Constitution.[27]

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[26] The Act gives the President up to five days to cancel items, but this allowance of a little additional time is of no practical or constitutional significance. The stated intention was that the President cancel "as soon as possible," and the five days were allowed for administrative convenience. H.R. Conf. Rep. No. 104-491, at 22 (1996). The significant point is that the cancellation was expected to occur in conjunction with signing, and without any intervening event or change in circumstances.

[27] Although the 104th Congress considered constitutional amendments to give the President the item veto power, none was ever voted on. S.J. Res. 2, 14, 15 & 16, 104th Cong. (1995); H.J. Res. 4, 6 & 17, 104th Cong. (1995); *see also The Line-Item Veto: A Constitutional Approach: Hearing on S.J. Res. 2 and S.J. Res. 16 Before the Subcomm. on the Constitution, Federalism, and Property Rights of the Comm. on the Judiciary*, 104th Cong. (1995). A statutory alternative, offered on the Senate Floor, was to give the President the equivalent of item veto power through "separate enrollment": after a spending or tax bill had been agreed upon by both Houses, the enrollment clerks divide it into separate items and

But Congress had a more pointed purpose as well: Members who believed that Congress was politically incapable of limiting expenditures decided that it would be desirable to abdicate that responsibility to the President.[28] Congress was quite clear that the intention was to invert the lawmaking process: "Presidential proposals [for cuts] will now become law unless Congress takes action to stop them." H.R. Rep. No. 104-11, pt. 2, at 9. As the Conference Report summarized, "The purpose of the [Act] is to promote savings by placing the onus on Congress to overturn the President's cancellations of spending and limited tax benefits." H.R. Conf. Rep. No. 104-491, at 16. Thus, the LIV Act intentionally "hands off to the President authority [over] fundamental legislative choices" as to which federal programs and activities are worth their cost and which are not. *Byrd v. Raines*, 956 F. Supp. 25, 37 (D.D.C.), *op. vacated*, 117 S. Ct. 2312 (1997).

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prepare a separately enrolled bill for each item; Congress would then pass the bills en masse, but the President could then sign or reject each bill separately. *See* S. 4, 104th Cong. (1995) (offered in Amendment No. 347); 141 Cong. Rec. S4188-89 (daily ed. Mar. 20, 1995). Both constitutional and administrative objections were raised to this cumbersome process, and although it passed the Senate, it did not survive the Conference. *See generally* H.R. Conf. Rep. No. 104-491; *see also* 141 Cong. Rec. S4217 (daily ed. Mar. 21, 1995) (statement of Sen. McCain); *id.* at S4224-35 (statement of Sen. Byrd); *id.* at S4244 (statement of Sen. Exon).

[28] *E.g.*, 142 Cong. Rec. S2955-57 (daily ed. Mar. 27, 1996) (statement of Sen. Stevens) (supporting the LIV Act and describing it as "the most significant delegation of authority by the Congress to President since the Constitution was ratified in 1789" and as "a major change in the balance of Government power"); *id.* at S2960 (statement of Sen. Gramm) ("no doubt about it . . . it changes the balance of power between the Congress and the President in one fundamental way: It gives the President enhanced power to say 'no' to spending."); *id.* at S2978 (statement of Sen. Kyl) ("[T]he Line-Item Veto Act is a good bill, but one that should not be necessary. Congress should always have the good sense to spend taxpayers' hard-earned money wisely . . . . Make no mistake about it, this bill will shift a great deal of new power to the President.").

Congress, if it disagrees with him, then has the "onus" of passing laws (if necessary, over his veto[29]) to overturn the essentially legislative actions the President has taken. The Act has turned on its head the constitutional lawmaking process, under which Congress legislates with only limited and qualified presidential participation, after which the President takes care that the laws are faithfully executed.

Defendant and amicus Senate argue that this grant of item-veto power to the President is saved by a *scintilla juris*. Gov. Br. 34-36; Sen. Br. 17-19. While conceding that Congress could not constitutionally give the President power to strike some provisions of a bill and sign only the remainder into law, they argue that this constitutional barrier has been circumvented by requiring the President to sign a whole bill (perhaps with the fingers of his other hand crossed) and then, an instant or up to five days later, strike the provisions that he does not approve, whether they be 5% or 95% of the bill. There are two answers to this argument.

First, at best, the *scintilla juris* is merely a device supporting a forbidden "indirect attempt[] to accomplish what the Constitution prohibits . . . accomplishing directly." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 829 (1995). The device treats the steps prescribed by Article I as "empty formalities," contrary to *Chadha*, 462 U.S. at 958 n.22. The instant of time is of course of no practical significance: the Act gives the President exactly the same power of final revision that President Washington knew the Constitution did not give him. The result of the whole, essentially unitary process (which if upheld in this case could be applied in the future to federal legislation of any kind whatever) is that the President edits the laws *as* they take effect, producing "truncated versions" not

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[29] As noted by amicus Senate, the President has vetoed the only disapproval bill passed to date by Congress. Sen. Br. 17.

passed by either house. *See Raines v. Byrd*, 117 S. Ct. at 2325 (Stevens, J., dissenting). The whole idea was to circumvent Congress's supposed inability to pass such truncated laws. To allow this device to succeed is to conclude that "the Framers spent significant time and energy in debating and crafting Clauses that could be easily evaded." *U.S. Term Limits*, 514 U.S. at 831.

Second, the Act in any event trips over its own strategy. A provision that has become law, even if only for an instant, may be repealed only by the full Article I process. *Chadha*, 462 U.S. at 954 ("repeal of statutes, no less than enactment, must conform with Art. I"). But the "cancellation" under the Act of Section 968 of the TRA, deleting Section 1042(g) of the Internal Revenue Code, was neither more nor less than a unilateral repeal of that provision. The verb "cancel," when its direct object is an existing statute, means the same thing as "repeal," [30] and Congress used the words interchangeably in drafting the Act.[31] The two words plainly have the same meaning here: the "cancellation" of Section 968 did not merely suspend the operation of I.R.C. § 1042(g). The cancellation killed the section itself, permanently ended its "legal force or effect," and stripped it out of the Internal Revenue Code unless and until a new statute adds it back. If the President later changes his mind, or reaches a different judgment based on experience, or if circumstances change so as to make the canceled tax benefit appear desirable, he cannot revive Section 1042(g) by himself but must instead seek passage of a new law through the full Article I process.

[30] The Act defines "cancel" to mean "to prevent . . . from having legal force or effect" with respect to items of new direct spending or limited tax benefits and to "rescind" with respect to discretionary budget authority. 2 U.S.C. § 691e(4). The first dictionary definition of the verb "repeal" is "1: to rescind or revoke (as a sentence or law) from operation or effect." *Webster's Third New International Dictionary* 1924 (1971).

[31] The House-passed version of the Act, H.R. 2, in fact used the terms "veto" and "repeal," and the related committee report confirmed that repeal was intended: "Any provision of law [vetoed under this Act], as set forth in a President's special message, shall be deemed repealed unless a rescission/receipts disapproval bill restoring that provision is enacted into law." H.R. Rep. No. 104-11, pt. 2, at 14 (1995); *see* H.R. 2, 104th Cong. §§ 2, 3(a)(1)-(2) (1995).

Appellants note that the Act provides that canceled items can again become law if Congress passes a "disapproval bill." Br. 34-35 n.20. But the disapproval bill provision does nothing to rescue the Act. A disapproval bill is a new law, requiring bilateral passage, presentment, and if there is a veto, congressional override. *See* 2 U.S.C. § 691d. Any provision of federal law can be enacted in that manner. (The Act merely provides for expedited congressional consideration of this class of bills.) And more fundamentally, the opportunity to consider a disapproval bill does not cure the basic defect: Under the Act, Congress is *never* given the opportunity to vote on the truncated law that resulted from the President's cancellation. The basic question for this Court is *not* whether an unconstitutional veto can be overcome but whether the enacted "truncated version" has received the consent of the governed through the Article I process.

Appellants argue (Br. 37-40) that there is no constitutional problem because the Act itself, which was adopted in the constitutional manner, authorizes the future cancellations and is deemed to be part of every future spending or tax statute. That argument merely begs the question, which is whether Congress can give the President power to "cancel" provisions of law as it has done here. The answer to that question is "no" whether Congress does so in advance, as it has done in the Act, or in the very law whose provisions are subject to cancellation.[32]

[32] Appellants argue (Br. 38) that Congress was "aware" when it passed the TRA that the LIV Act would allow the President to

To take a simple example that is not very far from the present case, suppose that Congress passed, and the President signed, an "Internal Revenue Code of 1999" replacing the entire 1986 Code and containing, as Section One, a provision stating, "The President may, within five days after signing this Code into law, cancel any provision hereof if in his judgment such cancellation will save money, not impair any essential government function, and not harm the national interest. Congress may restore any such provision by passing a new law in the manner prescribed in Article I of the Constitution." This Court, we respectfully suggest, would have little difficulty concluding that in adding such a provision Congress had simply abdicated its responsibility to write the tax laws of the United States. If such a law were constitutional, it is impossible to imagine a lawmaking task that Congress could not find a way to surrender to the President.

The LIV Act, and its operation in conjunction with the TRA, are equally unconstitutional. If appellees grant, *arguendo*, appellants' premise that the LIV Act should be thought of as "incorporated into" the TRA, and add the fact that pursuant to the Joint Committee's determination (*see* pp. 4 n.2, 7-8, *supra*) the TRA itself allows the President to cancel "only" 79 of its provisions as limited tax benefits, *see* Pub. L. No. 105-34, § 1701, 111 Stat. 1099-1103, Congress has still given the President an inconceivably vast slate on which to write or rewrite the tax laws. By appellees' calculation, the power to cancel or not cancel each of 79 provisions would enable the President to edit the TRA into 604,462,909,807,314,587,353,088 (two to the 79th power) different laws, only one of which was enacted by Congress. Appellants' assertion (Br. 38) that the LIV Act merely establishes a new "default rule," and

cancel its provisions. But "awareness" is not the equivalent of passage. Congress could not enact a law authorizing the Senate to delete provisions of House-passed bills and send truncated versions to the President, even though the House would be "aware" of this prospect when it later passed bills.

that Congress has in effect consented in advance to each of the truncated versions that might survive the President's cancellation power, ignores the fact that Congress has never actually considered or passed any of those bills and is belied by this arithmetic. Amicus Senate's assertion that "all participants in the lawmaking process agree to precisely the same statutory text" (Sen. Br. 19) is true only if it is meaningful to say that they have "agreed" to six hundred billion trillion texts.

C. The Line Item Veto Act Is an Abdication of Power To Make Laws, Not a Delegation of Discretionary Authority.

The fundamental constitutional point on which this case turns was stated by this Court in *Field v. Clark*, 143 U.S. 649, 692 (1892): "That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution." The Court's delegation doctrine rests on that premise. "The fundamental precept of the delegation doctrine is that the lawmaking function belongs to Congress, U.S. Const., Art. I, § 1, and may not be conveyed to another branch or entity." *Loving v. United States*, 116 S. Ct. 1737, 1744 (1996).[33] As *Loving* makes clear, it is the nontransferability of the "lawmaking function," the power to write federal law, that is "fundamental." The delegation doctrine (the rule that congressional delegations of power to the Executive Branch must be bounded by an "intelligible principle," *Mistretta v. United States*, 488 U.S. 361, 372 (1989)) is only an instance of that "fundamental precept."[34] The Act violates the fundamental precept; it does

[33] *See also Panama Refining Co. v. Ryan*, 293 U.S. 388, 421 (1935) ("The Congress manifestly is not permitted to abdicate, or to transfer to others, the essential legislative functions with which it is . . . vested.").

[34] Congress must constrain each grant of executive discretion by "intelligible principles," lest it give the executive what amounts to the power to make the law. But the converse proposition asserted

"convey[] to another branch or entity," specifically, the President, a "lawmaking function [that] belongs to Congress."

Appellants and amicus Senate argue that the Act does not empower the President to make or unmake law at all, but only grants him broad discretion to execute it. Appellants say, for example (Br. 40), that the "President's authority to 'cancel' tax . . . items is, in practical effect, no more and no less than the power . . . to 'decline to implement' specified tax measures." But that is neither the Act's intention nor its effect. Whatever else the Act's title and its mimicry of the veto power may demonstrate, they surely show that what Congress thought it was doing was giving the President a unilateral power to shape the law itself, not merely to implement it. And cancellations under the Act are designed to, and do, permanently alter the rights of private persons with interests in canceled items.[35] *See Chadha*, 462 U.S. at 952 (action that "ha[s] the purpose and effect of altering the legal rights, duties and relations of persons . . . all outside the Legislative Branch" is legislative and must be accomplished using the Article I process).

The present case is a perfect illustration. Section 968 of the TRA added Section 1042(g) to the Internal Revenue Code, altering the legal rights—the tax liability—

by appellants and amicus Senate is not true: a surrender of the lawmaking function is not *saved* by providing intelligible principles. For example, if Congress purported to empower the President to sign and turn into law bills passed by only one House, such power would be unconstitutional no matter what "intelligible principles" Congress prescribed for the use of the power. Here, Congress has purported to empower the President to, in essence, sign cancellation bills passed by neither House.

[35] *See* H.R. Conf. Rep. No. 104-491, at 29 (in different contexts cancellation negates the government's "legal obligation to pay a benefit," "eliminat[es] the increase in food stamp obligations that would otherwise occur," and "foreclose[s] the ability of the Federal Government to enter into an agreement to pay the amount of money provided in the law").

of persons who sell certain stock to eligible farm cooperatives. When the President canceled Section 968, he deleted Section 1042(g) from the Code. He did not merely decline to enforce it. He made a decision that is binding on himself and the Treasury Department, as well as the taxpayer, and that decision is permanent and irrevocable in a way that is a hallmark of legislative action: *Only Congress has the power to change it back*. If a change of circumstances, or a change of Presidents, leads the White House to believe that Section 968 should be law after all, the only thing the President can do is recommend a new statute to Congress.[36]

Appellant and amicus Senate recite a long list of historical examples of presidential discretion. Most of these relate to spending, or how the government manages its own affairs, and have little to do with changes in the

[36] The unconstitutionality of the Act is demonstrated with particular clarity by the "cancellation" of an Internal Revenue Code provision, which as the district court noted (*see* J.S. App. 30a), has no arguable historical analog. Senate Finance Committee Chairman Roth, a supporter of the LIV Act, made a similar point during floor debate: "My concern with this legislation is that I have never heard of impounding a tax cut." 142 Cong. Rec. S2968 (daily ed. Mar. 27, 1996). But the Act's application to spending measures is equally an abdication of legislative power.

Appellants (Gov. Br. 47-48) and amicus Senate (Sen. Br. 20-21) suggest that cancellation of tax measures poses no special problems, relying on the Court's statement that "the delegation of discretionary authority under Congress' taxing power is subject to no constitutional scrutiny greater than that we have applied to other nondelegation challenges." *Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212, 223 (1989). Appellees agree that tax measures are not unique: in *no* substantive field, taxation or otherwise, may Congress transfer its lawmaking function to the President. *Skinner* itself is not relevant to this case; it involved an extremely narrow delegation of authority to the Department of Transportation to adopt a schedule of regulatory fees. In the language quoted above, the Court was merely noting that the constitutionality of this delegation did not depend on whether the pipeline fees could be classified as "taxes."

Internal Revenue Code that alter the rights of private persons. Appellees agree with, and will not repeat, the analysis of these examples in the brief of appellees City of New York, *et al.* Amicus Senate, however, claims that Congress has also "long delegated authority to impose taxes," citing seven tariff statutes that empowered the President to suspend or reinstate tariffs, or raise or lower them, based on his findings of statutorily specified facts relating to foreign commerce. Sen. Br. 6-7 & nn.5-6. This Court discussed all of these examples in two cases, *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394 (1928), and *Field v. Clark*, 143 U.S. 649 (1892), and the Court's prior treatment of these examples strongly reinforces appellees' position in this case.

The Senate's first five examples—the Acts of March 3, 1815, ch. 77, 3 Stat. 224; May 31, 1830, ch. 219, § 2, 4 Stat. 425; January 7, 1824, ch. 4, § 4, 4 Stat. 2; and May 24, 1828, ch. 111, 4 Stat. 308; and the McKinley Tariff Act of 1890, ch. 1244, § 3, 26 Stat. 567, 612—all come from *Field v. Clark*, 143 U.S. at 685-94. All of these statutes were reciprocal tariff laws. In each, Congress either (a) imposed a tariff on imports and authorized the President to suspend it for a given country if he found that the country had similarly lifted duties on United States exports, or (b) repealed a tariff but made the repeal effective with respect to any given country only when the country lifted its duties on goods from the United States, again as certified by the President. In other words, Congress itself imposed or repealed the tariff in each of these cases; it simply made its action effective—country by country—under specified factual circumstances and left it to the President to make the necessary findings. The *Field* Court made the very point that is critical here: the President's role under all these statutes was to be the "mere agent of the law-making department to ascertain and declare the event upon which its expressed will was to take

effect." *Field*, 143 U.S. at 693,[37] The Court specifically held that this limited arrangement did not "invest the President with the power of legislation," which would have been impermissible. *Id.* at 692.

The two remaining tariff examples—the Acts of August 5, 1909, ch. 6, § 2, 36 Stat. 11, 82-83, and September 21, 1922, ch. 356, § 315(a), 42 Stat. 858, 941-42—come from *J.W. Hampton*, 276 U.S. at 400, 411-12. Both statutes provided for flexible tariffs: Congress set down general rules and authorized the President to make periodic modifications in light of changed circumstances in order to give the statutory policy its intended effect. The 1909 Act prescribed a two-part tariff: a base schedule plus a twenty-five percent surcharge. Both charges presumptively applied, but if the President made a specific finding that a country did not impose unfair barriers to imports from the United States, only the base schedule would apply. Act of August 5, 1909, 36 Stat. at 82-83. Similarly, the 1922 Act, the statute actually at issue in *J.W. Hampton*, set a base tariff schedule aimed at offsetting differences in the costs of producing various goods here and abroad and authorized the President to adjust the schedule periodically if he found such an adjustment was needed to attain cost parity. Act of September 21, 1922, 42 Stat. at 941-42. Again this Court's point was that in these Acts Congress had called on the Executive only to find the facts necessary to apply a duly enacted statute to particular cases: "Congress seems [in enacting the 1922 Act] to have doubted that the information in its possession was such as to enable it to make the adjustment [for production cost differences] accurately, and also to have apprehended that with changing conditions the difference might vary in such a way that some readjust-

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[37] *See also The Brig Aurora v. United States*, 11 U.S. (7 Cranch) 382 (1813) (allowing Congress to reimpose an earlier statute's restrictions on British shipping, but make reimposition contingent on the President's finding of specific factual conditions).

ments would be necessary to give effect to the principle on which the statute proceeds." 276 U.S. at 404-05; *see also id.* at 407.[38]

These tariff statutes, drawing on the President's ability to find facts and apply the law to them, are altogether different from the LIV Act, which authorizes the President to cancel tax laws he decides should not be the law of the land, immediately after Congress has passed them.[39] The LIV Act does not authorize the President to fill in gaps (even major gaps) in a statutory scheme adopted by Congress. It does not instruct him to adapt the operation of the law to the facts as he finds them, or to alter or terminate the operation of the law if he finds that specified facts have occurred or changed. Nor does it allow him continuing discretion to tailor the execution of the law in light of experience. It gives him a one-time power to strike provisions out of the Internal Revenue Code because he

[38] Amicus Senate also cites the Rules Enabling Acts, 28 U.S.C. § 2072(b) (1994); 18 U.S.C. § 3771 (repealed) ("REAs"), which empower this Court to prescribe rules of procedure for the lower federal courts and provide that such rules supersede prior conflicting laws. Sen. Br. 24. In the REAs, Congress decided to assure that all former rules of practice, procedure, and evidence for the federal courts would be replaced by the new uniform system that this Court would promulgate. But the REAs have no bearing on the question whether the LIV Act unconstitutionally expands the President's power under Article I or merely delegates executive authority under Article II. The REAs concern the very different relationship between Congress and this Court in writing rules for lower federal courts established under Article III, and, in any event the constitutional questions presented by the REAs have never been adjudicated.

[39] There are also other pertinent differences between import tariffs and domestic tax statutes. The President has special constitutional responsibilities for foreign affairs and hence special expertise in matters involving international trade. The Court noted this point in *Field v. Clark*: "[I]t is often desirable, if not essential . . . to invest the President with large discretion in matters arising out of the execution of statutes relating to trade and commerce with other nations." 143 U.S. at 691.

alone deems them not to be in the best interests of the nation.

D. Even if the Line Item Veto Act Were Viewed as a Delegation of Executive Authority, It Would Be Invalid.

Even if the Act could properly be viewed as a delegation of executive power and thus tested against the requirement of an "intelligible principle," it would fail: the Act contains no such principle precisely because the intention was to treat the President like a lawmaker. "Executive action is always subject to check by the terms of the legislation that authorized it; and if that authority is exceeded it is open to judicial review . . . ." *Chadha*, 462 U.S. at 953 n.16. By contrast, the Members of Congress (and the President himself when he is acting in his limited Article I role) are not subject to any constraint other than the Constitution and their own best judgments of the nation's interests. The Act makes no serious pretense of providing any "check," because it does not intend to grant any sort of discretionary executive power under Article II but rather to give the President a new role in the lawmaking process under Article I.

The Act requires the President to make three determinations, 2 U.S.C. § 691(a)(A), but none of them is any sort of meaningful "check." The first, that the cancellation of the tax benefit will "reduce the Federal budget deficit," is tautologically true whenever there is such a deficit, a condition the 104th Congress assumed would prevail for the foreseeable future, *see* H.R. Rep. No. 104-11 pt. 1, at 4; *id.* pt. 2, at 7; H.R. Conf. Rep. No 104-491, at 15. The second and third, that the cancellation will "not impair any essential Government functions" and not "harm the national interest," tell the President only that he should not do anything he considers seriously harmful. These provisions are phrased in the negative: they give the President no affirmative guidance whatever as to which items

to cancel.[40] And even as negative instructions they are all but content-free; they provide no basis for anyone other than the President to judge whether an item should be vetoed, or for the judicial review that *Chadha* describes as normally concomitant to executive action.

Appellants and amicus Senate struggle to find other features of the LIV Act that they can claim are constraints on the President's cancellation power. All the features they identify, however, are procedural requirements that were not intended to and do not constrain the President's substantive judgment in any way. Thus, they cite, Sen. Br. 26, the limitation of the power of cancellation to the five days after enactment, but the obvious purpose of that limitation was to tie the cancellation to enactment, in imitation of an item-veto power. They cite, Gov. Br. 47, the requirement that the President "consider" the legislative history and purposes of the statute he is evaluating, the sources of information referenced therein, and the definitions contained in the LIV Act, but this requirement appears to relate only to the President's determination of what is an "item" subject to cancellation; it certainly does not give the President any substantive guidance (or subject him to any constraint or to judicial review) in deciding whether to cancel those cancelable items he has identified.

Finally, appellants cite, Gov. Br. 47, the requirement that the President articulate the reasons for his cancellations, but that requirement only mimics the constitutional provision that when the President "returns" a bill he shall do so "with his Objections." U.S. Const. art. I, § 7, cl. 2. Appellants assert that this requirement of explanation

[40] For the same reason, appellants' observation that Congress made the classes of items subject to cancellation smaller than it could have, Gov. Br. 47; *see also* Sen. Br. 27, is irrelevant to the question whether Congress provided the President with meaningful guidance as to how to chose among the items in the classes it established.

"provides an additional safeguard against arbitrary action," Br. 47 (citing *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Auto Insurance Co.*, 463 U.S. 29, 43 (1983)), but *State Farm* further illustrates the difference between executive action and a presidential item-veto or repeal. General principles of law barred the executive agency in *State Farm* from acting arbitrarily, and judicial review was available to enforce the bar. In this case, by contrast, defendant cannot explain how a presidential cancellation could possibly *be* "arbitrary," because the word has no meaning in this context: the whole idea is to allow the President to make, at the time he signs a tax bill, whatever choices he alone deems wise or expedient, *i.e.*, to act like a President wielding a veto pen.

This Court's delegation cases, cited by appellants at Br. 44-46, generally involved delegations to the President and to administrative agencies to "fill up the details" of general provisions of law.[41] When the details to be filled up in legislation are dependent on facts, it is particularly

[41] *See, e.g., Loving v. United States*, 116 S. Ct. 1737 (1996); *Touby v. United States*, 500 U.S. 160 (1991); *Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212 (1989); *Mistretta v. United States*, 488 U.S. 361 (1989); *FEA v. Algonquin SNG, Inc.*, 426 U.S. 548 (1976); *Lichter v. United States*, 334 U.S. 742 (1948); *American Power & Light Co. v. SEC*, 329 U.S. 90 (1946); *Yakus v. United States*, 321 U.S. 414 (1944); *NBC v. United States*, 319 U.S. 190 (1943); *New York Cent. Secs. Corp. v. United States*, 287 U.S. 12 (1932). An arguable exception to this pattern is *Opp Cotton Mills v. Administrator of Wage and Hour Div.*, 312 U.S. 126 (1941), which has been described as "[t]he only case in which the power of an administrative official to modify a rule enacted by Congress relating to domestic affairs has been sustained." *The Constitution of the United States of America: Analysis and Interpretation*, Senate Doc. No. 99-16, 82 (1987). But *Opp Cotton Mills* is best understood as a "fill up the gaps" case. In the Fair Labor Standards Act, Congress established a general minimum wage but delegated to an agency the authority to increase the minimum in particular industries if it made specified findings after notice and comment proceedings. Congress thus merely authorized the agency to fill in the minimum wage amounts in accordance with specified instructions, while providing a general, interim baseline itself.

appropriate to call on the Executive, which can bring to bear both expertise and flexibility.[42] To be sure, the gaps to be filled are sometimes wide, as in the statute giving the FCC the power to grant radio licenses "if public convenience, interest, or necessity will be served thereby." 47 U.S.C. § 307(a); *see NBC v. United States*, 319 U.S. 190, 215-16 (1943). But even such delegations are constrained by the historical context and policies of the substantive statute, and do not permit the delegate to overrule or to cancel what Congress has specifically prescribed. *See Mistretta v. United States*, 488 U.S. 361, 374-77 (1989) (describing "overarching constraints" on Sentencing Commission). If the delegation doctrine imposes any continuing limits on congressional transfer of power to the President, they have been exceeded here.

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[42] *See, e.g., Touby*, 500 U.S. 160 (Attorney General temporarily scheduled controlled substances on specified factual finding); *Lichter*, 334 U.S. 742 (in wartime, administrative officials renegotiated defense contracts on finding that profits were excessive); *Yakus*, 321 U.S. 414 (in wartime, Executive set price ceilings after making a series of highly factual determinations); *FPC v. Hope Natural Gas Co.*, 320 U.S. 591 (1944) (agency may set power rates after fact-finding).

CONCLUSION

The Court should affirm the judgment of the district court.

Respectfully submitted,

DONALD B. HOLBROOK
RANDON W. WILSON
WILLIAM H. ORTON
ANDREW H. STONE
JONES, WALDO, HOLBROOK & McDONOUGH
170 South Main Street
Salt Lake, UT 84101
(801) 534-7283

LLOYD N. CUTLER
LOUIS R. COHEN
Counsel of Record
LAWRENCE A. KASTEN
JONATHAN J. FRANKEL
PAUL R. ECKERT
MATTHEW A. BRILL
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000

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